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No. 08-720

Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHALE CALLAHAN,

Petitioner,

v.

STEVEN M. FERMON AND DIANE CARPER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the appellate court's determination that petitioner's speech was undertaken pursuant to his official duties for purposes of the First Amendment analysis set out in *Garcetti v. Ceballos,* 547 U.S. 410 (2006), when petitioner himself admitted that he spoke as part of his job responsibilities; his current claim otherwise implicates no genuine split in authority, only manufactured splits that this case would not implicate in any event; and where a holding by this Court that the lower court misapplied *Garcetti* would have no effect on the outcome because respondents are entitled to judgment on an alternate, threshold ground.

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BRIEF IN OPPOSITION

The petition for certiorari should be denied. Petitioner admitted that he engaged in the speech at issue pursuant to his job responsibilities and thus may not complain now that the Seventh Circuit relied on his concessions to hold exactly that. In fact, any error in the lower court's application of *Garcetti v. Ceballos*, 547 U.S. 410 (2006), cannot change the outcome here because respondents are entitled to qualified immunity under even petitioner's theory of First Amendment law. Finally, this case implicates no split in authority. Petitioner alleges multiple splits, but they are wholly manufactured, and in any event involve questions not posed on the facts of this case.

STATEMENT

This is an employment case, not a murder case. Two separate juries heard the evidence and convicted Randy Steidl and Herbert Whitlock. Tr. 1399, *Whitlock v. Godinez*, 51 F.3d 59, 64 n.6 (7th Cir. 1995); *People v. Whitlock*, 528 N.E.2d 1371, 1374 (Ill. App. Ct. 1988); *People v. Steidl*, 568 N.E.2d 837, 841-42 (Ill. 1991). Because this petition concerns petitioner's First Amendment retaliation claim, respondents will primarily focus on the undisputed facts establishing that petitioner was speaking pursuant to his official duties.

In the spring of 2000, a private investigator for Steidl's post-conviction attorney sent a letter to the

Illinois State Police ("ISP"), asking it to review aspects of the murder of Dyke and Karen Rhoads. Pet. App. 3. Petitioner, who was assigned to the matter, *ibid.*, reviewed the case file created by the initial investigators as well as information provided by the private investigator, Tr. 1403-1404, and issued written conclusions indicating his view that there were problems with the convictions, Pet. App. 3. But petitioner also wrote that the purpose of his review was "not to indicate the guilt or innocence of either R. Steidl or H. Whitlock." PX 69. He further stated: "Certainly in my mind, Whitlock still remains a viable suspect, especially if my time line for the murders is correct." *Ibid.* Additionally, Petitioner had become suspicious that a person named Robert Morgan might have been involved in the murders. Pet. App. 3. During this time, federal authorities were investigating Morgan for a number of crimes, including drug trafficking and money laundering. *Ibid.* According to petitioner, he was not allowed to investigate Morgan regarding the Rhoads murders, but he could investigate Morgan for other possible criminal activities. *Ibid.*

For the next two and a half years, petitioner and the ISP continued to investigate Morgan. Among other things, the ISP conducted aerial surveillance of Morgan's properties using the Wisconsin Air National Guard and installed video cameras in a mobile home adjacent to one of Morgan's businesses to conduct surveillance. Tr. 1223-1226.

On January 8, 2003, an Illinois deputy governor called petitioner and explained that the governor was considering clemency for Steidl and Whitlock. Pet. App. 3. According to petitioner, the deputy governor asked for petitioner's opinion on the merits of the convictions. *Ibid.* Petitioner stated that he needed to speak with his superiors before responding. Pet. App. 4. Petitioner then called Steven Fermon, his supervisor and a respondent here, resulting in a meeting the next morning at the ISP Academy. Tr. 1130, 1552-1553.

Petitioner was ordered to attend the meeting, which lasted all day, and present information regarding his investigation. Tr. 1234-1236. As an ISP lieutenant, petitioner's job required him to attend meetings, exchange information regarding his investigations, answer questions from superior officers, keep these officers apprised of issues, be prepared to interact with peers, and report up the chain of command. LPR. 28-8, pp. 4-11. ISP investigators from throughout Illinois attended the January 9, 2003 meeting, which was held on ISP property during normal working hours and was open to ISP employees only. Tr. 1014, 1131, 1234-1236. Both Fermon and petitioner made presentations. Petitioner described his suspicions about Morgan's other possible criminal activities and, as a result, was ordered to create a plan to investigate Morgan further. Tr. 1135-1137. The ISP Deputy Director said he wanted a "full court press," that is, a full-scale investigation in conjunction with federal authorities

of Morgan and his associates. Within weeks, a task force comprised of numerous federal and state law enforcement agencies was created to investigate Morgan. Tr. 1245. The task force first met in February and continued to meet throughout 2003. Tr. 1429.

Throughout this time, petitioner's relationship with Fermon was strained. Pet. App. 4. By 2003, petitioner had become suspicious that Fermon was compromising the Morgan investigation, *ibid.*, because Fermon had told petitioner he had eaten pizza at a restaurant supposedly owned by a felon, Tr. 1362-1363, 1603, 1632. Petitioner made this claim even though he had information proving the restaurant was not, in fact, owned by a felon. Tr. 1603, 1632. Petitioner also alleged that Fermon had "ties" to organized crime, Tr. 1342, because Fermon's wife's sister's nephew was related to a mobster murdered in 1932, Tr. 1326, 1343-1344.

The hostility between petitioner and Fermon made their office a difficult place to work. Pet. App. 5. Between late 2002 and April 2003, the ISP's Equal Employment Opportunity Office (EEOO) investigated a hostile work environment complaint arising out of the stress in the office. *Ibid.* In April 2003, the EEOO informed ISP's upper command, who in turn informed Diane Carper, also a respondent here, that the employees had broken into "camps" or "teams" – one favoring Fermon and the other favoring petitioner. Tr. 1393, 1640-1642.

In April, after the EEOO interviewed petitioner, he contacted the ISP's Division of Internal Investigations ("DII") to report his suspicions of misconduct by Fermon. Tr. 1322, 1326. ISP policy specifically requires ISP employees to report alleged wrongdoing of other ISP employees to DII. PX 77 (employees must report misconduct "when misconduct is observed"). Before contacting DII, petitioner spoke with a fellow task force member who was an FBI agent. Tr. 710, 1340. Petitioner spoke to the FBI agent as a friend about his plans to complain to DII regarding Fermon. *Ibid.*

In May 2003, petitioner made a second complaint to DII, reasserting his allegations about Fermon and adding a claim that Carper had blocked the Rhoads homicide investigation. Tr. 1251-1252, 1322, 1326. Because petitioner's allegation involved a federal investigation, DII met with the local FBI upper command. Tr. 1027, 1596. DII informed the FBI of the allegations, but the FBI decided against investigating them. Tr. 1597, 1600-1603. After reviewing the complaints and meeting with the FBI, DII similarly determined not to take action on the allegations. Pet. App. 5.

Following the EEOO's reports to the ISP's upper command, it was determined to transfer both petitioner and Fermon to different offices. Tr. 655-656, 1557-1563, 1060-1061. Every witness who testified regarding the process leading up to this decision stated that petitioner's statements at the January 9, 2003 meeting and his DII complaints were

not considered in his lateral transfer, and, moreover, that Fermon was not involved in the transfer decision. Tr. 231, 248, 253, 670-671, 1161-1163, 1567-1568, 1644-1649. In fact, Fermon, who resides in Vermillion County on the Indiana border, was transferred to Springfield, Tr. 1561, which is over 100 miles away. For his part, petitioner was transferred to a nearby office and suffered no reduction in pay or supervisory responsibilities. Tr. 1450-1452, 1566.

Following his transfer, petitioner sued, claiming that he suffered retaliation for engaging in protected speech on three occasions: (1) his statements at the January 9, 2003 meeting, (2) his April 2003 DII complaint, and (3) his May 2003 DII complaint. Pet. App. 5. Nothing in petitioner's complaint, the final pre-trial order, or the jury instructions alleged any retaliation for statements made to the FBI or any other federal, state, or local agency. Tr. 1801, 1905.

Petitioner testified that he had gone to the DII with his suspicions about Fermon and Carper because his job required him to do so. LPR. 28-2, p. 52 ("My job was to bring the concerns and allegations to [DII]."). During closing argument, his counsel echoed this point, arguing to the jury that petitioner went to the DII because he "did what the policies and procedures of the Illinois State Police mandate." Tr. 1834-1835. Even on appeal, Petitioner continued to assert that he had a professional obligation to make complaints to DII, arguing in his brief to the Seventh

Circuit that he had "a professional obligation to come forward." Appellee's Br. 46.

REASONS FOR DENYING THE PETITION

There are multiple, independent reasons for denying the petition. First, the rule announced in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), was based upon the parties' stipulation that the employee's actions were made pursuant to his job duties. This case is no different. Here, petitioner and his counsel repeatedly admitted that petitioner's statements to DII were made pursuant to his job duties. Those concessions alone, unmentioned anywhere in the petition, make further review by this Court unwarranted.

Second, even if this Court were to conclude that the Seventh Circuit misapplied *Garcetti* (and it did not), such a conclusion would have no effect on the outcome of this case – the Court would still be required to affirm on the independent ground that respondents are entitled to qualified immunity. Respondents consistently argued below that they had violated no clearly established law. Because the Seventh Circuit found no violation of petitioner's constitutional rights, it did not need to reach the issue of qualified immunity. But in this Court petitioner argues that courts are confused over the proper application of *Garcetti*. If that is true, then qualified immunity applies. Indeed, following this Court's recent decision in *Pearson v. Callahan*, 129 S. Ct. 808

(2009), it would be appropriate to resolve any further appeal on this ground, without even reaching the *Garcetti* question on which petitioner seeks review.

Third, this case implicates no split in authority. At the outset, petitioner's heavy reliance on district court and unpublished appellate court decisions demonstrates that the rule announced in *Garcetti* has had insufficient time to percolate in the federal courts. But petitioner's cases are readily harmonized in any event. Courts are not divided over whether the nature of employee speech – was it or was it not made pursuant to the employee's job duties – is a question of law or a mixed question of law and fact. And even if courts were divided on this score, such a split would not be implicated in this case, where on appeal petitioner never sought a remand for renewed findings of fact. It is too late to advance that forfeited claim for the first time now. Nor does this case implicate any supposed split over whether an employment policy requiring employees to report misconduct makes such reports job-related for *Garcetti* purposes, for this argument depends entirely on a misstatement of Illinois law and ISP policy. Finally, petitioner alleges other issues that have purportedly confused lower courts, but this case does not implicate any one of those issues, nor is there any genuine conflict as to any of them.

Accordingly, the certiorari petition should be denied.

I. Petitioner Repeatedly Admitted That His Speech Was Made Pursuant To His Official Duties, Meaning Petitioner Has Conceded Away The *Garcetti* Question He Now Presents To This Court.

As petitioner points out, in *Garcetti*, the parties conceded that the employee speech in that case "was made pursuant to [the employee's] job duties." Pet. 3 (internal quotations omitted). But this case is no different because petitioner repeatedly admitted that his statements to DII were made pursuant to his job duties. In fact, the Seventh Circuit specifically relied on these admissions to hold that petitioner's statements were not constitutionally protected. Pet. App. 10.[1] First, during his deposition, petitioner testified that it was part of his job to inform DII of the alleged misconduct:

> And what I told DII at that meeting was that it wasn't my job to determine. I came to them with concerns. I certainly hope that a captain in the Illinois State Police would not do criminal activity, but that wasn't my job to

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[1] In the Seventh Circuit, petitioner argued that he suffered retaliation for: (1) his statements at the January 9, 2003 ISP Academy meeting, and (2) his two complaints to DII. Petitioner focuses the petition for certiorari on the latter claims, implicitly conceding that the Seventh Circuit correctly held that the statements at the meeting – which petitioner's supervisor required him to attend and where he spoke about the results of an investigation he had been ordered to undertake – were within his job duties.

> determine. *My job was to bring the concerns and allegations to them.* It was their job to investigate to see what my concerns – what my concerns and allegations were factual or not.

LPR. 28-2, p. 52. Petitioner's counsel reiterated the admission during closing argument. He stated:

> Now, I think I told you earlier they have said that Michale Callahan went to DII, or they are going to tell you, Michale Callahan went to DII out of animosity or spite towards Steve Fermon. * * * If you have concerns, what do you do? You go to the Division of Internal Investigations. He did what he was supposed to do. *He did what the policies and procedures of the Illinois State Police mandate that you do*, and look what happened to him.

Tr. 1834-1835 (emphasis added). Finally, petitioner admitted in his brief to the Seventh Circuit that he had an occupational duty to report misconduct to DII: "In a very broad sense, Callahan did have a professional obligation to come forward." Appellee's Br. 46.

Courts consistently hold that *Garcetti* bars First Amendment claims where, as here, the plaintiff admits that his speech was made pursuant to his job duties. See *Battle v. Bd. of Regents of the State of Georgia*, 468 F.3d 755, 761 (11th Cir. 2006) (relying on "Plaintiff's own admission" to hold that speech "was

made pursuant to her official employment responsibilities"); *Hill v. Borough of Kutztown*, 455 F.3d 225, 242 (3rd Cir. 2006) (relying on concession in complaint and appellate brief that plaintiff spoke "pursuant to his official duties" and as "part of his duties as Manager"); *D'Angelo v. Sch. Bd. of Polk County*, 497 F.3d 1203, 1210 (11th Cir. 2007) (plaintiff's claim barred by admission that speech was made pursuant to job duties); *Sigsworth v. Aurora*, 487 F.3d 506, 511 (7th Cir. 2007) (plaintiff's claim barred by admission that he was merely doing what employer expected of him).

Accordingly, petitioner's admissions alone doom his First Amendment claim, making it unnecessary for the Court to address any of the *Garcetti* issues on which petitioner seeks review.

II. Petitioner's Suit Fails At The Threshold On Qualified Immunity Grounds, Before Even Reaching His First Amendment Claim.

Petitioner's request for this Court's review is predicated upon the alleged existence of a split in authority regarding the proper application of *Garcetti*. But if such a split exists, respondents would be entitled to qualified immunity, see, *e.g.*, *Pearson*, 129 S. Ct. at 822-823, as they consistently argued below,

App. 7.[2] Qualified immunity exists whenever officials are alleged to violate a constitutional right that is not clearly established. *Pearson*, 129 S. Ct. at 823 (holding that police officers were entitled to qualified immunity because "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.") (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). In short, petitioner seeks further review on the grounds that the law is unclear, but if the law is unclear, then respondents are entitled to qualified immunity. And following this Court's recent decision in *Pearson*, it would be appropriate to affirm the judgment below on qualified immunity grounds, before even reaching the merits of petitioner's First Amendment claim.

III. Petitioner Identifies No Circuit Split, And Even The False Splits He Alleges Would Not Be Implicated By This Case.

Petitioner identifies three purported circuit splits: (1) one over whether the *Garcetti* analysis raises a question of law or a mixed question of law and fact, Pet. 17-23; (2) another over whether a

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[2] In addition to qualified immunity, respondents argued several other grounds for reversal, including lack of causation, improper jury instructions, and evidentiary issues. Each of these presents an independent ground for affirming the judgment below.

workplace policy requiring employees to report misconduct means that such reporting is work-related for *Garcetti* purposes, Pet. 24-31; and (3) still another over the proper treatment of three purportedly recurring factors used in determining whether employee speech is work-related, Pet. 31-37. Each of these alleged splits is manufactured, and even if genuine, none of them would be implicated here.

A. This Case Implicates No Split Of Authority Over Whether *Garcetti* Presents A Question Of Law Or A Mixed Question Of Law And Fact.

Petitioner relies chiefly on a purported, post-*Garcetti* circuit split over whether a court answers a question of law, or a mixed question of law and fact, when it decides if employee speech was pursuant to the employee's job duties. If courts must analyze the issue as a mixed question of law and fact, then petitioner argues he was entitled to a remand to the district court for additional fact-finding. But this is not grounds for certiorari review for three, independent reasons: (1) petitioner never requested a remand for additional fact-finding from the Seventh Circuit, and it is too late to advance this forfeited claim now; (2) the split that petitioner alleges does not exist; and, (3) even if it did, it is immaterial because petitioner *admitted* that he spoke to DII pursuant to his official duties.

1. Petitioner now seeks a ruling directing the court of appeals to remand his case for further fact-finding, but he never asked the Seventh Circuit for that relief. Nowhere in petitioner's appellate brief did he argue that *Garcetti* poses a mixed question of law and fact requiring a remand for additional proceedings. Instead, petitioner's 84 page brief included nothing more than a single passing comment on the standard of review, without asking for a remand. Appellee's Br. 39-40. And during oral argument, although the court repeatedly asked petitioner's counsel whether he was seeking a remand, counsel repeatedly urged the court not to remand the case but to affirm the trial judgment outright. Oral Argument, No. 05-4313, dated January 10, 2008 at 27:13 through 28:00 (found at www.ca7.uscourts.gov). Only after repeated questions from the bench did counsel begrudgingly acknowledge that a remand "might" be in order:

> Question: Well, that's why I am asking you if you think it should be remanded. You gave me a different response a moment ago.
>
> Answer: I don't think this case should be reversed outright. I think that on the record we win. But if the Court feels differently I concede that a remand might be necessary.

Oral Argument, No. 05-4313, dated January 10, 2008 at 35:02 through 35:32 (found at www.ca7.uscourts.

gov). Indeed, even in his petition for rehearing *en banc*, petitioner again failed to make any argument that *Garcetti* issues pose a mixed question of law and fact requiring a remand for additional fact-finding.

Petitioner may not argue for the first time in this Court that the Seventh Circuit implicitly reached an erroneous legal conclusion, and thereby failed to remand the case for further fact-finding, when petitioner never raised his current legal argument (that the statements were made pursuant to his job duties is a mixed question of law and fact requiring a remand) at any point before that court, much less ask that court to remand for additional proceedings. See, *e.g.*, *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) ("We cannot decide issues raised for the first time here."); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941) ("Ordinarily, an appellate court does not give consideration to issues not raised below."). Accordingly, this case is not a vehicle for resolving the alleged split to which petitioner devotes the bulk of his petition.

2. In any event, there is no conflict between the law in any other circuit and the Seventh Circuit's implied conclusion that determining whether employees' statements are made pursuant to their job duties can be a question of law. Petitioner is simply wrong to assert that this is invariably a mixed question of law and fact in the Second, Third, Eighth, or Ninth circuits. The Third Circuit has reviewed the *Garcetti* question as a matter of law in at least two decisions. In *Hill* the court held that

> [i]nsofar as it is based on this report to the Borough Council, Hill's First Amendment claim must fail because, as Hill concedes, he reported Marion's conduct and harassing actions to the Borough Counsel 'pursuant to his official duties.' Under *Garcetti* he was not speaking as a citizen when he made these reports, and, thus, *as a matter of law,* the reports are not protected speech.

455 F.3d at 242 (emphasis added). Subsequently, in *Reilly v. City of Atlantic City,* 532 F.3d 216 (3d Cir. 2008), the Third Circuit again reviewed the *Garcetti* question as a matter of law: "[T]he fact of Reilly's sworn testimony at the Munoz trial is sufficiently developed on this appeal for us to determine as a matter of law whether that speech was made 'pursuant to his official job duties' * * * ." *Id.* at 227 (quoting *Garcetti*, 547 U.S. at 421). Likewise, the Eighth Circuit has held that, under *Garcetti*, "[t]he inquiry into the protected status of speech is one of law, not fact." *Hyalla v. Transportation Commc'n Int'l Union,* 536 F.3d 911, 919 n.4 (8th Cir. 2008).

The Second Circuit also appears to treat this issue as a question of law. In *Reuland v. Hynes*, 460 F.3d 409 (2d Cir. 2006), the court explained that, under *Garcetti*, an employee's speech is entitled to First Amendment protection only if he was not speaking pursuant to his duties as an employee. See *id.* at 415. Without discussing the need for fact-finding by the lower court, the court concluded: "That is clearly not the case here." *Ibid.* It is not surprising then that

the district court cases upon which petitioner relies, Pet. 21, do not say that the Second Circuit employs a mixed question standard when applying *Garcetti*. Rather, these cases simply reiterate *Garcetti*'s mandate that determining the scope of an employee's job duties is a fact-specific, practical inquiry. See *Jackson v. Jimino*, No. 1:03-CV-722, 2007 WL 189311, at *6 (N.D.N.Y. Jan. 19, 2007) ("In determining whether the speech was pursuant to a plaintiff's official duties, the Supreme Court has noted that a court must make a practical inquiry into the situation * * * ."); *Caruso v. Massapequa Union Free Sch. Dist.*, 478 F. Supp. 2d 377, 382-383 (E.D.N.Y. 2007) ("It is clear, however, that application of *Garcetti* requires a fact-specific inquiry.").

Finally, although petitioner relies on the Ninth Circuit's decision in *Marable v. Nitchman*, 511 F.3d 924 (9th Cir. 2007), that court has not held conclusively that the *Garcetti* analysis is a mixed question of law and fact. Compare *Marable*, 511 F.3d at 930-933, with *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008). Indeed, even the district courts in the Ninth Circuit recognize that the issue remains unresolved there. See, *e.g.*, *Maniates v. Lake County Oregon*, No. CV 08-3038-PA, 2009 WL 395159, at *1 n.1 (D. Or. Feb. 12, 2009) ("Ninth Circuit precedents seem to be inconsistent on whether the *Garcetti* determination is made by the court or the jury.")

In short, the circuit split petitioner claims simply does not exist. And because the circuits are not truly

split, there is no need for certiorari. The Second, Third, and Eight Circuits are in line (and the Ninth may well be) not only with the Seventh Circuit's decision in this case, but with other courts, which even petitioner concedes permit the *Garcetti* question to be resolved as a matter of law. Pet. 18 ("Like the Seventh Circuit, the First, Fifth, Tenth, and District of Columbia Circuits have concluded that the question is purely legal.") Moreover, although petitioner does not mention it, the Eleventh Circuit is also in accord. See, *e.g.*, *Battle*, 468 F.3d at 760.

3. And even if there were a split, this case would not provide a vehicle to resolve it. Petitioner not only failed to raise the issue below, but he also conceded repeatedly that he spoke to DII as part of his job duties. See *supra* pp. 9-11. Accordingly, the (unpreserved) question that this case presents is not whether statements made pursuant to job duties are generally a question of law, but whether they may be treated as a question of law where, as in *Garcetti* itself, the plaintiff admits that he spoke as an employee rather than as a member of the public. Indeed, even if petitioner were correct that *Garcetti* typically presents a mixed question of law and fact – contrary to every court to have reached a definitive answer on the question – that still would not mean that courts could not resolve the issue as a matter of law in those rare instances in which (as here) the plaintiff concedes the point.

B. There Is No Circuit Split Over The Effect Under *Garcetti* Of A Workplace Policy Requiring Employees To Report Misconduct.

Contrary to the petition, Pet. 24-31, there is no split over the effect of a general workplace policy requiring employees to report misconduct. Petitioner claims that the Seventh and Eleventh Circuits "are clearly at odds" with the Fifth and Ninth Circuits, *id.* at 28, and that several district courts are also in disagreement, at 24-25. And petitioner further maintains, Pet. 25-27, that his speech somehow falls outside the ambit of his job duties because he failed to follow the workplace reporting policy to the letter.

1. In fact, there is no genuine conflict over employment policies. Petitioner cites decisions that reach different outcomes, to be sure, but those differences are merely the product of different facts, not a dispute over governing legal principles. Thus, petitioner's claim that the Ninth Circuit's decision in *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006), is inconsistent with the Seventh Circuit's decision in the present case and the Eleventh Circuit's in *Battle* is readily refuted by the significant factual distinctions among these decisions.

In *Freitag*, which holds that a former corrections officer's complaints to her state senator and the inspector general regarding alleged sexual harassment of female prison guards were protected speech, there was no admission that the speech at issue was

part of the officer's job duties. See 468 F.3d at 542-545. Both the present case and *Battle* involve such admissions, and they were dispositive on the *Garcetti* issue. See *supra* pp. 9-11 (discussing Petitioner's admission that his statements to DII were part of his job duties); *Battle*, 468 F.3d at 761 ("Plaintiff admitted that she had a clear employment duty to ensure the accuracy and completeness of the student files as well as to report any mismanagement or fraud she encountered in the student financial aid files.").[3] Moreover, the plaintiff in *Freitag* made external complaints, including to the inspector general's office and a state senator, which gave her speech "broader scrutiny." 468 F.3d at 545. In contrast, petitioner communicated his concerns through internal agency channels only. And like petitioner, the plaintiff in *Battle* limited her reporting to her place of employment, the Office of Financial Aid and Veterans Affairs. See 468 F.3d at 758-759 ("Plaintiff never spoke to anyone outside FVSU about Huff's fraudulent activities until after she received notice that her contract would be removed."). Standing alone, this distinction disposes of petitioner's purported split, for "the case law is unanimous in holding that employees'

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[3] Petitioner also relies upon *Williams v. Riley*, 275 Fed. Appx. 385 (5th Cir. 2008), an unreported decision without precedential value, see 5th Cir. Rule 47.5.2. *Williams*, like *Freitag*, is distinguishable from *Battle* on its facts. Similar to *Freitag*, there was no admission in *Williams*. In fact, the plaintiffs in *Williams* specifically denied that they had any official duty to report. See *id.* at *2.

communications that relate to his own job function up the chain of command, at least within his own department or division, fall within his official duties and are not entitled to First Amendment protection." *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008).

Petitioner attempts to avoid this result by arguing that he made complaints to outside agencies, such as the FBI and DII. Pet. 26. But petitioner ignores the district court's jury instructions, which provided that the speech at issue in this case did not include petitioner's conversation with the FBI agent. Tr. 1801 (identifying petitioner's claims as being based solely upon his statements to ISP officials at the Academy and to ISP's DII investigators). Moreover, petitioner went to his friend in the FBI solely for advice about how to proceed with his concerns, and the friend merely advised petitioner to speak with DII, which he did. Tr. 710.

As for DII, it is not a separate agency, as petitioner contends, but a division of the ISP. Illinois statutory law is clear in this regard: "The Department is divided into the Illinois State Police Academy and 4 divisions: the Division of Operations, the Division of Forensic Services, the Division of Administration, and *the Division of Internal Investigation.*" 20 ILCS 2605/2605-25. (emphasis added). As such, petitioner's assertion that his statements were made outside the ISP is a mischaracterization of Illinois law.

Finally, the plaintiff in *Freitag* was not required to report misconduct to outside agencies as part of her job. Instead, she elected to do so as a citizen. See *Freitag,* 468 F.3d at 545. In *Battle*, by contrast, Department of Education regulations required the plaintiff to report fraud and inaccuracies. See 468 F.3d at 761 (noting that DOE Guidelines require all financial aid workers to report suspected fraud). Likewise, ISP Directive PER-030 required petitioner to report the allegations that he brought to the DII.

2. Nor is there anything to petitioner's suggestion that his speech fell outside of his job duties because he failed to follow the ISP's reporting policy to the letter. Pet. 25-27. And this argument calls for mere error correction in any event. Petitioner contends that his speech was protected because he did not report Fermon's alleged misconduct immediately and directly up the chain of command, which would have required him to make the report to Fermon himself. But such departures from the letter of PER-030 do not undo petitioner's employment obligation to report his suspicions. It cannot be that fulfilling a job duty imperfectly somehow makes it any less a duty. Moreover, the undisputed evidence at trial established that petitioner was following established ISP policy by making the complaint directly to DII rather than to Fermon under these circumstances. Tr. 1253, 1276.

3. Finally, to the extent the federal district courts actually differ in the application of *Garcetti* to a work place policy requiring employees to report

misconduct, the courts of appeals, rather than this Court, should address any such differences in the first instance. At this point, the appellate courts simply have not had adequate time to do so. See *Davis*, 418 F.3d at 312. Any tension among non-binding district court decisions, without any split among federal appellate courts, is not grounds for certiorari review.

C. The Three Purportedly Recurring Disputes Arising From The Application Of *Garcetti* Are Not At Issue In This Case And, In Any Event, Do Not Exist.

The final part of the petition is a scattershot description of supposedly similar fact patterns producing different results, prefaced with a request that this Court do the impossible and announce a single formula "to be applied in every case where there is a question of whether an employee is speaking pursuant to an employment duty." Pet. 32. Petitioner groups his cases under three headings: (1) statements made by employees in public hearings that are related to the scope of employment; (2) compelled testimony; and (3) memoranda pertaining to job duties. *Id.* at 31-37. What petitioner fails to consider, however, is that his case does not implicate any of these three areas. Nor is there any dispute over the governing legal principles in any of them.

1. The first purported source of confusion surrounds statements by employees in public hearings relating to their employment. *Id.* at 32-33. For this, petitioner relies on *Lindsey v. City of Orrick, Missouri,* 491 F.3d 892 (8th Cir. 2007), and *Caraccilo v. Village of Seneca Falls, N.Y.,* 582 F. Supp. 2d 390 (W.D.N.Y. 2008). In *Lindsey,* a municipal employee voiced concerns over possible violations of Missouri's open meetings law during city council meetings. See 491 F.3d at 896. And the village employee in *Caraccilo* complained during a village public safety meeting that New York's open meetings law required that minutes of the meeting be recorded. See 582 F. Supp. 2d at 408.

But petitioner does not seek First Amendment protection for statements made at a public hearing or meeting. The statements for which he alleges retaliation were his private April 22 and May 8, 2003 communications with DII officials. Appellee's Br. 18-19. And his January 9, 2003 statement was made at a meeting of ISP investigators convened to discuss a possible response to an inquiry from the governor's office regarding the Steidl and Whitlock murder convictions, *ibid.* This meeting was attended only by ISP employees, Tr. 1131-1132, and involved a discussion of an ongoing ISP investigation, which necessarily was closed to the public. Because this case does not involve any statements made at a public hearing or meeting, petitioner's first identified dispute does not warrant this Court's review.

2. Petitioner's second issue is immaterial for the same reason. He describes three cases involving application of First Amendment protections to compelled testimony. Pet. 33-34. Respectively, the cases involve a police officer's testimony at the criminal trial of a fellow officer, a police officer's subpoenaed deposition testimony in a civil suit, and a jailer's testimony at an emergency hearing regarding unsafe conditions at a county jail. See *Reilly,* 532 F.3d at 224-228; *Morales v. Jones,* 494 F.3d 590, 598 (7th Cir. 2007); *Green v. Barrett,* 226 Fed. Appx. 883, 886 (11th Cir. 2007). Contrary to petitioner's vague assertion, there are no "direct parallels between" the compelled testimony in these cases and petitioner's statements at the January 9, 2003 meeting, Pet. 35, which was convened to discuss the Steidl and Whitlock convictions internally. Petitioner was not subpoenaed to attend the meeting and did not testify under oath. He attended the meeting at his supervisor's direction.

3. Finally, petitioner does not seek First Amendment protections for a memorandum, so petitioner's remaining cases are irrelevant. Petitioner alleges retaliation based on three oral statements: (1) his presentation at the January 9, 2003 meeting; (2) his April 22, 2003 conversation with an official from DII; and (3) his May 8, 2003 conversation with DII. So even if there were confusion over how to treat an employee's memorandum under *Garcetti* (and there is not, see *supra* pp. 19-23), this case simply does not present that issue.

4. In fact, there is no genuine confusion in any of the areas that petitioner highlights. What petitioner identifies are mere factual differences yielding differences in outcome, consistent with this Court's admonishment in *Garcetti* that any inquiry into the scope of an employee's duties is a "practical one." 547 U.S. at 424.

For example, in claiming a "circuit" split between *Lindsey* (an Eighth Circuit decision) and *Caraccilo* (a district court decision) over statements made in public hearings, petitioner overlooks the obvious factual differences between those cases. In *Lindsey*, the plaintiff's speech about possible violations of the open meetings law was protected by the First Amendment because "there [was] no evidence Lindsey's job duties even arguably included sunshine law compliance." 491 F.3d at 898. In contrast, the employee who spoke up about open meetings compliance in *Caraccilo* "believed that it was her duty to take minutes of the meeting," so the court unsurprisingly held that her communications were made as a public employee, not as a private citizen. See 582 F. Supp. 2d at 411.

Petitioner's compelled testimony cases are just as easily reconciled. According to petitioner, the Third Circuit's decision in *Reilly* and the Seventh Circuit's decision in *Morales* are inconsistent with the Eleventh Circuit's unpublished opinion in *Green*. But the speech in *Green* differed significantly from the criminal trial testimony in *Reilly* and the subpoenaed deposition testimony in *Morales*. *Green* involved an

emergency hearing called by the county sheriff to consider whether a particular inmate should be transferred from the county jail to a maximum security state prison due to safety concerns. See 226 Fed. Appx. at 884. The chief jailer testified regarding the jail's unsafe conditions and was subsequently fired. *Ibid.* In sharp contrast to *Reilly* and *Morales*, where employees provided testimony that was clearly outside of their job duties:

> Green [did] not dispute that she testified at the hearing because she was the Chief Jailer, the public employee responsible for the conditions at the jail. Nor [did] she contend that the purpose of her statements was to communicate to the public her concerns about the general safety of the Fulton County Jail or the necessity for change in the conditions of the jail. Rather, her statements were made in a hearing conducted for the specific purpose of assessing whether the jail was a safe place for inmate Al-Amin to be housed. On these facts, Green's testimony was given pursuant to her official duties as Chief Jailer.

Id. at 886. Again, these decisions reflect no legal inconsistency, just the application of settled law to different facts. And in any event, the only Seventh Circuit decision that petitioner cites, *Morales*, held that the employee speech in that case was protected, and therefore (even if petitioner's case had involved coerced testimony) petitioner could not claim that the Seventh Circuit's rule somehow prejudiced him.

Finally, the fact that courts in different cases involving written speech reached different results is neither surprising nor evidence of a split over the proper legal rule. As with petitioner's other authority, the varying outcomes in these cases stem from factual differences. For example, petitioner contrasts the Ninth Circuit's decision in *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121 (9th Cir. 2008), with *Haynes v. City of Circleville, Ohio*, 474 F.3d 357 (6th Cir. 2007). But again these cases presented very different facts. Posey was a high school security specialist who wrote to district officials with both personal grievances and complaints about inadequate safety and security policies at the school. See 546 F.3d at 1123-1124. Because the parties specifically disputed whether the plaintiff had any policy-making responsibility or authority, the Ninth Circuit remanded the case to the district court for additional fact-finding on this question. See 546 F.3d at 1123-1130. In contrast, Haynes, a police canine handler, wrote to the chief of police complaining that reductions in canine training time would likely raise an imminent risk of physical harm. See 474 F.3d at 359-360. Unlike Posey's letter, which was sent to several school district officials, see 546 F.3d at 1124, Haynes wrote solely to his supervisor, see 474 F.3d at 360. Nor was there any dispute that Haynes' letter addressed precisely his employment duties – administration of the canine training unit. See *id.* at 364. As the Sixth Circuit noted, "Haynes had developed the standard operating procedure for the canine unit and worked with his dog as part of his day-to-day professional

activities." *Ibid.* Thus, his writing "as a whole is best characterized as that of a disgruntled employee upset that his professional suggestions were not followed as they had been in the past." *Ibid.* It was not so obvious that Posey's letter related to his job duties, which had been substantially reduced before he wrote it. See 546 F.3d at 1124-1125.

5. As explained, the lower courts are not split over the proper application of *Garcetti*. But even if they were, more time is needed to allow the relevant issues to percolate in the courts of appeal. Petitioner argues that *Garcetti* failed to articulate a comprehensive standard for determining the scope of an employee's job duties in the First Amendment context. Pet. 3. According to petitioner, this has "created confusion amongst the lower courts and has resulted in inconsistent decisions and inconsistent applications of principles espoused by this Court in *Garcetti*." *Id.* at 3-5. In support, petitioner cites a long list of district court cases. *Id.* at 4-5 n.1. As discussed, however, see *supra* pp. 20-21, there is no circuit split over how to determine an employee's job duties for First Amendment purposes; rather, the differences in the post-*Garcetti* cases stem from factual differences, not legal disagreements. Nor do the courts of appeal identify any "confusion" over how to apply *Garcetti*. In fact, many indicate just the opposite. See, *e.g.*, *Davis*, 518 F.3d at 313 ("Cases from other circuits are consistent in holding when a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is

undertaken in the course of performing his job"); *Brammer-Hoelter v. Twin Peaks*, 492 F.3d 1192, 1203 (10th Cir. 2007) ("Cases interpreting *Garcetti* have made clear that speech relating to tasks within an employee's uncontested employment responsibilities is not protected from regulation."); *Wilburn v. Robinson*, 480 F.3d 1140, 1150 (D.C. Cir. 2007) ("In the wake of *Garcetti,* courts of appeal have denied First Amendment protection to government employee speech if the contested speech falls within the scope of the employee's uncontested job responsibilities"); *Casey v. West Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1331 (10th Cir. 2007) (noting that "[o]ther cases to emerge after *Garcetti* confirm our conclusion").

In any event, this Court's review at this time would be premature. *Garcetti* is only two years old. Thus, to the extent that true legal disagreements were to arise, the lower courts have not had sufficient time to resolve them. See *Davis*, 518 F.3d at 312 ("Because *Garcetti* is a recent decision, lower courts have had limited opportunity to interpret it."). Petitioner's heavy reliance on district court and unpublished decisions, rather than published appellate court decisions, illustrates this point. Twenty-four of the 64 cases cited in the petition are district court or unpublished decisions.

Notably, this Court has denied petitions for writs of certiorari in nine other cases involving the application of *Garcetti*. See *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), cert. denied sub nom., *Flipping v. Reilly*, ___ S. Ct. ___, 2009 WL

425096 (2009); *Nixon v. City of Houston, Texas,* 511 F.3d 494 (5th Cir. 2007), cert. denied, 128 S. Ct. 2504 (2008); *Vose v. Kliment,* 506 F.3d 565 (7th Cir. 2007), cert. denied, 128 S. Ct. 2500 (2008); *Morales v. Jones,* 494 F.3d 590 (7th Cir. 2007), cert. denied, 128 S. Ct. 931 (2008); *Spiegla v. Hull,* 481 F.3d 961 (7th Cir.), cert. denied, 128 S. Ct. 441 (2007); *Haynes v. City of Circleville, Ohio,* 474 F.3d 357 (6th Cir.), cert. denied, 128 S. Ct. 538 (2007); *Green v. Barrett,* 226 Fed. Appx. 883 (11th Cir.), cert. denied, 128 S. Ct. 439 (2007); *Freitag v. Ayers,* 468 F.3d 528 (9th Cir. 2006), cert. denied, 549 U.S. 1323 (2007); *Reuland v. Hynes*, 460 F.3d 409 (2d Cir. 2006), cert. denied, 128 S. Ct. 119 (2007). Between these petitions for writs of certiorari and petitioner's, no new developments have arisen requiring this Court's review. And if this Court were inclined to grant a petition to address *Garcetti*'s application, this case would be the wrong vehicle. This case involves a simple application of *Garcetti* to undisputed facts, including petitioner's repeated admissions that he took his complaints to DII pursuant to his job duties.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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